

STATE OF MICHIGAN
IN THE SUPREME COURT

DONNA DECOSTA,

Plaintiff-Appellant,

v.

DAVID D. GOSSAGE, D.O., and
THE GOSSAGE EYE CENTER,

Defendants-Appellees.

Supreme Court File No. 137480

Court of Appeals File No. 278665

Trial Court File No. 06-747-NM

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PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

(Oral Argument Requested)

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AUTHORITY FOR SUBMISSION OF THIS BRIEF & QUESTIONS PRESENTED

This Supplemental Brief from Plaintiff-Appellant is filed pursuant to this Court's Order of April 24, 2009. There were two pointed special directives in that Order – to wit:

- The main Order's instruction to the parties that "they should not submit mere restatements of their application papers"; and
- The request in Justice Young's concurring statement specifically asking parties to do two things: (1) "to address the theory under which a plaintiff may send a notice of intent to file a claim (NOI) to an address *other than* the defendant's 'last known business address,' as required by MCL 600.2912b(2), and still receive the benefit of NOI tolling"; and (2) "to address whether plaintiff receives the benefit of NOI statutory tolling with respect to defendant Gossage Eye Center (a professional corporation operated as the Gossage Eye Institute, PLLC) assuming for the sake of argument that the notice provisions of MCL 600,2912b do not expressly apply to a professional corporation."

Plaintiff-Appellant submits this more focused and hopefully fully responsive – to the several questions and concerns of the Justices – Supplemental Brief with full confidence that this Court will consider that which is in the Application for Leave and that it does not require or even wish to have a fully case-comprehensive brief such as is otherwise required by the Michigan Court Rules and which has already been submitted.

Therefore, all of what follows is in addition to what has already been submitted to this Court, which establishes that, as Defendants-Appellees openly and unqualifiedly concede – namely, that (1st) Defendants-Appellees **actually received a timely NOI** and that (2nd) when the

timely NOI was sent, Defendants-Appellees continually maintained their medical practice – albeit not their main office – at the very address to which the NOI in this case was sent and where it was received and signed for on behalf of both Defendants.

SUPPLEMENTAL LEGAL ANALYSIS & ARGUMENT

I. EVEN IF THIS COURT CONCLUDES THAT THE NOI WAS NOT SENT TO DEFENDANTS' LAST KNOWN ADDRESS, ACTUAL NOTICE TO THE DEFENDANT PHYSICIAN, WHICH IS CONCEDED IN THIS CASE, IS A WHOLLY SUFFICIENT SUBSTITUTE FOR COMPLIANCE WITH MCL 600.2912b(2), THE NOI STATUTE.

A. There are a very large number of instances in Michigan law in which actual notice has been held to be a legally adequate substitute for a procedurally-required notice.

Several examples follow.

1. Notice Requirements under the Motor Vehicle Accident Claims Act (MVACA).

Background: Pursuant to the MVACA, a party injured by the negligent operation of a motor vehicle by an uninsured person may bring an action to recover damages out of a fund administered by the state. *Notice Requirement:* In all actions in which recovery is to be sought against the fund, said action must be commenced within three years from the time the cause of action accrues. Recovery from the fund shall not be allowed in any event unless notice of intent to claim against the fund is served upon the Secretary of State, on a form prescribed by him, within 6 months of the date that the cause of action shall accrue. MCL 257.1118.

Conclusion: In general, Michigan courts have been willing to overlook the procedural notice requirements of MCL 257.1118 when there is sufficient evidence indicating that the Secretary of State had actual notice of the accident upon which the claim was filed.

<u>Case Name</u>	<u>Facts</u>	<u>Holding/Analysis</u>
<i>Howell v Lazurak</i> , 388 Mich 32, 199 NW2d 188 (1972)	<p>Plaintiffs were injured in an automobile accident with the uninsured defendant. Plaintiffs sued, trying to recover under the MVACA. However, plaintiffs did not file the required notice with the Secretary of State within the statutory period.</p> <p>Plaintiffs argue that the SOS had actual notice, which was provided by: (1) the notice form filed by the estate of another injured party to the accident; and (2) the state police report (a copy of which was filed with the SOS), which indicated that plaintiffs suffered visible injuries in the accident.</p>	<p>Purpose of the notice of intent to claim requirement is to "afford the governmental agency an opportunity to investigate and preserve the evidence before the claim had become too stale, and to protect the Fund from possible spurious claims for which no defense could be made for want of timely notice and timely investigation." <i>Howell</i>, at 4.</p> <p>Because actual notice sufficiently fulfills this purpose, Plaintiffs' claims are not barred by their failure to meet the procedural notice requirements outlined in MCLS § 257.1118: "Because of the remedial nature of this Act and because of the lack of prejudice to the defendant, we hold that plaintiffs' failure to file notice within the time required under MCLA 257.1118; MSA 9.2818, is not a bar to recovery under the circumstances of this case." <i>Howell</i>, at 45.</p>

<p><i>Stacey v Sankovich</i>, 19 Mich App 688; 173 NW2d 225 (1969)</p>	<p>Plaintiff was injured in an accident with an uninsured motorist. Plaintiff failed to send a formal notice of intent to claim with the Secretary of State.</p> <p>Plaintiff argues that the Secretary had actual notice because: (1) within one year of the accident, Plaintiff mailed a letter to the Motor Vehicle Accident Claims Fund division of the Secretary's office indicating he was filing a claim; and (2) three passengers, who were in P's car during the accident, filed formal notices of intent to claim with the Secretary.</p>	<p>Plaintiff's claim is not barred because of failure to file the required notice of intent within the statutory period. Plaintiff's letter, combined with the Secretary's actual notice, satisfy the intent of the statute.</p> <p>"The record fails to demonstrate that the secretary was prejudiced by the plaintiff's failure to use the forms provided by the secretary. The plaintiff supplied the secretary with much of the information required by the standard form. In addition, the secretary had actual and complete knowledge of the essential facts of the accident, including the names of all witnesses and injured parties, the driver's name and address, and relevant police reports. Affidavits were filed below indicating the secretary's investigators were working on the case. Under the facts of this case, in the absence of a showing of prejudice, plaintiff's letter of December 16, 1966, coupled with the secretary's actual knowledge of the existence of the accident and of possible exposure of the fund to liability for payment, satisfies the intent of the statute." <i>Stacey</i>, at 697.</p>
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2. Notice Requirements in Insurance Contracts.

Notice Requirement: Typical insurance policies require the insured to provide the insurer notice of a potential claim within a reasonable time or within a specific window of time. These time requirements are designed to protect the insurer against prejudice and to allow it to adequately investigate the claim before the evidence has become stale.

Conclusion: In general, our Michigan courts have found that actual notice received by the insurer negates any potential prejudice caused by the insured's delay in formally giving or filing notice under some policy-specified procedure. Therefore, where the insurer has actual knowledge, an insured claim will not be barred despite the insured's failure to provide notice within the time period mandated by the policy.

<u>Case Name</u>	<u>Facts</u>	<u>Holding/Analysis</u>
<i>Farmers Ins. Exchange v Horenburg</i> , 43 Mich App 91; 203 NW2d 742 (1972)	<p>Defendant (insured) was in an automobile accident with an uninsured driver. Defendant and his insurance company (Plaintiff/insurer), filed suit against the uninsured motorist. While this case was pending, Defendant decided that his policy with Plaintiff covered the accident and requested arbitration with the Plaintiff to settle the claim.</p> <p>Plaintiff filed a declaratory judgment action, arguing that Defendant's arbitration request was barred because the policy required Defendant to perfect his action within one year of the accident (and the arbitration request was made a year and a half afterwards).</p>	<p>The Court of Appeals held that that defendant's arbitration request was not barred because plaintiff had prompt actual notice of the accident and injuries and had undertaken efforts to investigate them within a year of the accident. Plaintiff had actual notice, so he suffered no prejudice from defendant's belated arbitration request.</p> <p>"[T]he insurance company had prompt actual notice of the accident and injuries and did investigate so there was no prejudice to the plaintiff by reason of the defendants' belated request for arbitration." <i>Horenburg</i>, at 94.</p>

<p><i>Turner Cartage & Storage Co v Jefferson Ins Co</i>, 10 Mich App 546; 159 NW2d 863 (1968)</p>	<p>Plaintiff (insured) filed a declaratory judgment action against Defendant (insurer) seeking coverage for damage to cargo as a result of an auto accident.</p> <p>The insurance policy in question required that the insured give the insurer notice within a reasonable time regarding an accident. Defendant claimed that Plaintiff failed to meet this requirement.</p>	<p>The insured's untimely notice did not bar coverage because: (1) it did not prejudice the insurer; and (2) the insurer had actual notice of the accident.</p> <p>"Remaining is the question of whether the policy coverage was defeated by not giving notice within a "reasonable time" as required by the policy. An unreasonable delay in notification would be such delay that the insurance company would be prejudiced in some way because of the delay. Here, we find no reason to overrule the trial judge's factual determination that no prejudice was incurred by Jefferson Insurance because of any interim between the collision and a formal notice to Jefferson Insurance. In this light, we also note that it appears from the record that Jefferson Insurance had actual notice of the collision and that its agents were investigating the collision before it received formal notice." <i>Turner</i>, at 551-552.</p>
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3. Tort Claims against the Government Involving Statutory Notice-of-Claim Requirements.

Notice Requirements: Most states have statutes that impose notice-of-claim requirements for tort actions brought against the government. In order to hold the governmental body liable, the party seeking recovery must file a notice of the tort claim within a prescribed period of time.

Conclusion: There does not appear to be any Michigan case law dealing directly with this issue. However, there a significant number of courts around the country have concluded that

actual notice is sufficient and that failure to provide the statutorily prescribed notice does not serve to bar a party from filing a tort claim against the government.

Sampling of Cases From Other Jurisdictions Holding that Actual Notice is Sufficient

Indiana

Scott v Gatson, 492 NE2d 337 (Ind Ct App 1986)

New Mexico

Powell v New Mexico State Highway & Transp. Dep't, 872 P2d 388, (NM Ct App 1994), cert. den. 873 P.2d 270

Callaway v New Mexico Dep't of Corrections, 875 P2d 393 (NM Ct App 1994)

New York

King v New York, 452 NYS2d 607 (Ct App 1982) (actual knowledge within 90 days)

Law v Rochester City School Dist., 486 NYS2d 540 (Ct App 1985)

Wetzel Servs. Corp v Town of Amherst, 616 NYS2d 832 (Ct App 1994)

Alvarenga v Finlay, 639 NYS2d 115 (Ct App 1996) (absence of prejudice)

South Dakota

Smith v Neville, 539 NW2d 679 (SD SCt 1995)

Wisconsin

Elkhorn Area School Dist. v East Troy Community School Dist., 327 NW2d 206 (Wis Ct App 1982)

4. Special Tax Assessments for Public Improvements

Notice Requirement: Michigan law mandates that a municipal corporation seeking to use a special tax assessment to finance a public improvement must hold a public hearing on the special assessment. The municipal corporation must provide notice of the hearing to each affected property owner by first class mail, at least 10 days before the date of the hearing. See MCL 211.741 (notice of hearings in special assessment proceedings shall be given to each owner of or party in interest in property to be assessed whose name appears upon the last local tax assessment

records by mailing by first class mail addressed to that owner or party at the address shown on the tax records at least 10 days before the date of the hearing).

Conclusion: Under Michigan law, actual notice may serve as a substitute for the procedural notice requirements of MCL 211.741. See MCL 211.744 (special assessment shall not be declared invalid as to any property if the owner or the party in interest thereof has actually received notice, has waived notice, or has paid any part of the assessment).

<u>Statute</u>	<u>Text of Statute</u>	<u>Conclusion/Analysis</u>
MCL 211.741	“For each special assessment made against property, notice of all hearings in the special assessment proceedings shall be given as provided in this act in addition to any notice of hearings to be given by publication or posting as required by statute, charter, or ordinance. The provisions of this act in respect to service of notice by mail shall supersede any existing statutory, charter, or ordinance requirements for mailing notice. Notice of hearings in special assessment proceedings shall be given to each owner of or party in interest in property to be assessed whose name appears upon the last local tax assessment records by mailing by first class mail addressed to that owner or party at the address shown on the tax records at least 10 days before the date of the hearing . . . ”	<i>Establishes Procedural Notice Requirements:</i> Notice of the special assessment hearing must be made by first class mail at least 10 days before the date of the hearing.

MCL 211.744	<p>“Invalidation of assessment; reassessment.</p> <p>Sec. 4. Any failure to give notice as required in section 1 shall not invalidate an entire assessment roll but only the assessments on property affected by the lack of notice. A special assessment shall not be declared invalid as to any property if the owner or the party in interest thereof has actually received notice, has waived notice, or has paid any part of the assessment. If any assessment is declared void by court order or judgment, a reassessment against the property may be made.”</p>	<p><i>Provides "Actual Notice" Exception to the Procedural Notice Requirements: Actual notice may serve as a substitute for procedurally inadequate notice. A court will not declare a special assessment invalid when the property owner in question had actual notice of the hearing despite the municipal corporation's failure to provide notice as required by statute.</i></p>
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5. Notice under the Indian Child Welfare Act (ICWA).

Notice Requirement: Before initiating an action to terminate the parental rights over a Native American child, the ICWA mandates that notice must be given to the child’s parents, as well as to any Indian tribe to which the child might be able to claim membership. The ICWA requires that the notice be made by registered mail, return receipt requested.

Conclusion: Our Michigan Courts have been willing to overlook the procedural notice requirements of the ICWA when the relevant required parties have received actual notice.

<u>Case Name</u>	<u>Facts</u>	<u>Holding/Analysis</u>
<i>Family Independence Agency v Conselyea (In re TM)</i> , 245 Mich App 181; 628 NW2d 570 (2001)	Family Independence Agency (FIA) brought action, seeking the termination of Conselyea's parental rights over a Native American child (T.M.). As mandated by the ICWA, FIA and the circuit court sent notice to Conselyea and the federal Indian tribes to which T.M. could claim membership. However, they failed to send the notice in the manner required by the ICWA. Specifically, they did not send the notice by registered mail, return receipt requested.	The Court of Appeals rejected Conselyea's argument, holding that the failure to follow the notice provisions of the ICWA did not mandate invalidation of the termination action because all the relevant Indian tribes as well as the Bureau of Indian Affairs had received actual notice of the termination action.
	On appeal, Conselyea argued that the FIA and the circuit court failed to follow the notice provisions of the ICWA and therefore the termination action should be invalidated.	"We conclude that petitioner's substantial compliance with the notice provisions of the ICWA in this case was sufficient because actual notice was demonstrated and that the circuit court did not err in terminating respondent's parental rights. Therefore, we affirm." <i>In re TM</i> , at 184.

6. Condemnation Proceedings under the Drain Code.

Notice Requirements: The Drain Code of 1956 established a procedure by which public drains and drainage districts could be established by local communities/counties. As part of this process, a board of determination held hearings where landowners affected by the proposed drain, as well as other community members, could attend and voice their opinions. The statute, as it stood in 1956, required that notice of the hearing had to be physically posted in five public locations within the drainage district. *Conclusion:* This Court declined to invalidate the establishment of a drainage district for failure to provide the statutorily mandated notice when the affected landowners had actual notice of the hearing.

<u>Case Name</u>	<u>Facts</u>	<u>Holding/Analysis</u>
<i>In re Fitch Drain</i> No. 129, 346 Mich 639; 78 NW2d 600 (1956)	<p>In order to establish a county drain, the county board of determination was required to hold a hearing to discuss the proposed drain and drainage district. In addition, the board was statutorily required to provide notice of the hearing by physically posting five notices in public places throughout the proposed drainage district.</p> <p>The board failed to follow the procedural notice requirements because only four of the five notices were actually posted in the drainage district. The fifth was posted on a road outside of the drainage district.</p> <p>Plaintiff landowners brought suit against the county drain commissioner and others to overturn defendants' establishment of a county drain. One of plaintiffs' arguments focused on the deficiency in notice.</p>	<p>This Court upheld the establishment of the county drain, finding that the procedurally deficient notice could be overlooked in this case because Plaintiffs had actual notice of the hearing.</p> <p>"That the notices required by the statute were not posted in 5 public places in the drainage district. It is true that while the notice was posted in 4 public places, the fifth notice was posted not in the drainage district but in the right-of-way of the road separating the Caledonia township drainage area from Gaines township and on the Gaines township side of the road. This was not a strict compliance with the statute but the objection is a pure technicality when we stop to consider that the object of a notice is to inform and notify interested parties of the time and place when they may be heard. Not only did the petitioners for this writ have actual notice, but they were present at the meeting of the board and were heard." <i>In re Fitch Drain</i>, at 644-645.</p>

7. Criminal Sanctions for Aggravated Stalking

Notice Requirements: Under Michigan law, the criminal offense of aggravated stalking consists of the crime of stalking plus the presence of an aggravating circumstance as specified by statute. See MCL 750.411i. An example of an aggravating circumstance is a previous restraining

order issued against the accused, preventing him or her from making contact with the alleged stalking victim. In order for the violation of the restraining order to constitute an aggravating circumstance (thereby ratcheting the crime up from stalking to aggravated stalking), the accused must have received notice of the restraining order prior to the alleged criminal conduct.

Conclusion: With respect to aggravated stalking, Michigan courts have consistently held that actual notice of the restraining order serves as a sufficient substitute for the procedurally mandated service of the restraining order. Therefore, a violation of a restraining order can qualify as an aggravating circumstance despite the fact that the accused was never properly served with the restraining order, so long as the accused had actual notice of the restraining order prior to the alleged aggravated stalking. In sum, the restraining order does not need to be validly served in order for its violation to qualify as an aggravating circumstance (assuming that the accused had actual knowledge/notice of the restraining order).

<u>Case Name</u>	<u>Facts</u>	<u>Holding/Analysis</u>
<i>People v Threatt</i> , 254 Mich App 504; 657 NW2d 819 (2002)	<p>Defendant was charged with aggravated stalking. Under MCL 750.411i, the crime of aggravated stalking consists of the crime of "stalking" and the presence of an aggravating circumstance. Violation of a restraining order may constitute an aggravated circumstance.</p> <p>According to defendant's argument, a violation of a restraining order could only qualify as an aggravating circumstance where the defendant has received the procedurally required notice (i.e. personal service) of the restraining order prior to the alleged conduct. Personal service of the restraining order had never been accomplished on the defendant prior to the alleged criminal conduct.</p>	<p>This Court found that the violation of the restraining order could still qualify as an aggravating circumstance despite the lack of personal service. The Court held that actual notice was all that was required under Michigan law for the crime. Therefore, because there was sufficient evidence that defendant had received actual notice of the restraining order, the lack of personal service did not serve as a bar to an aggravated stalking charge.</p> <p>"Viewed in a light most favorable to the prosecution, the evidence is sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant had actual notice of the PPO. <i>People v Johnson</i>, 460 Mich 720, 723; 597 NW2d 73 (1999). The complainant's testimony demonstrated that defendant made several statements from which his knowledge of the PPO could reasonably be inferred, that he had evaded service, and that defendant spoke with both the complainant and an investigator about the PPO. The evidence is sufficient to establish that defendant had "actual notice" of the order." <i>Threat</i>, at 506-507.</p>

8. Foreclosure Sales.

Notice Requirements: When a Michigan court confirms a commissioner report of a foreclosure sale, notice regarding the filing of the report must be given to the affected parties. Such notice is to be achieved through service of a written notice of the filing.

Conclusion: Courts in Michigan are unwilling to hear objections to orders confirming reports of foreclosure sales based on inadequate service when the party seeking to object had actual notice of the filing, despite not being served with a written notice.

<u>Case Name</u>	<u>Facts</u>	<u>Holding/Analysis</u>
<i>Wesbrook Lane Realty Corp v Pokorny</i> , 250 Mich 548; 231 NW 66 (1930)	<p>Defendants defaulted on a real estate mortgage. As a result, defendants' property was foreclosed and sold. The circuit court commissioner issued a report regarding the sale and the report was confirmed.</p> <p>Defendants objected to the order confirming the report of sale made by the commissioner. The trial court overruled these objections.</p> <p>Defendants appealed, arguing that the order confirming the report of sale should be invalidated due to inadequate service. Because no written notice of the filing was served on their attorneys, defendants argued they did not receive adequate notice of the filing of the report of sale to permit them to properly object.</p>	<p>This Court affirmed the lower court's ruling overruling the objection to the order confirming report of foreclosure sale. The Court found that because defendants had actual notice of the filing, they suffered no injury from the deficient service.</p> <p>"While no written notice of the filing was served on defendants' attorneys, it is apparent that they had notice thereof. One of them had informed plaintiff's attorney that the defendants had not the money to redeem and would not do so, but desired to retain possession as long as possible. The plaintiff offered to permit redemption after the time limited therefor had expired. As no injury resulted to defendants from the lack of such service, the order overruling the objections filed is affirmed." <i>Wesbrook Lane Realty Corp</i>, at 551.</p>

- B. Specifically in medical malpractice cases, when the law of other states imposes a presuit notice requirement, analogous to Michigan's NOI statute, those states have held that actual notice would satisfy their pre-suit notice requirements. Two

examples follow. The Florida example is particularly apt because the case is so fully reasoned and that reasoning so fully articulated.

1. CALIFORNIA.

Cal. Code Civ. Proc. § 364. Notice required as condition precedent to bringing action

(a) No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action.

(b) No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered.

(c) The notice may be served in the manner prescribed in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.

(e) The provisions of this section shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name, as provided in Section 474.

(f) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death,

provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

Just like Michigan (see below), the purpose of California's Notice of Intent-to-sue (NOI) requirement is to provide health care providers and potential plaintiffs with the opportunity to engage in prelitigation settlement negotiations. *Derderian v Dietrick*, 65 Cal Rptr 2d 800, 804 (Ct App 1997) ("The notice of intent to commence a medical malpractice action is not a mere formality. Rather, the Legislature intended that it serve as a means of ensuring that health care providers and potential plaintiffs have the opportunity to engage in prelitigation settlement discussions."). Given that purpose, California courts are primarily concerned with actual notice being provided to the defendant health care provider. *Id.* at 804-05 (noting that the purpose can only be accomplished "when the health care provider receives actual notice from the potential plaintiff"); see also *Jones v Catholic Healthcare West*, 54 Cal Rptr 3d 148, 153 (Ct App 2007). The procedural requirements regarding notice mentioned in §364(c) are usually only even discussed in the cases in situations in which the health care provider did not receive actual notice prior to the expiration of the statute of limitations. See, e.g. *Silver v McNamee*, 81 Cal Rptr 2d 445, 454-56 (Ct App 1999) (noting that §364 does not require actual notice be received by the health care provider where the plaintiff has provided notice in a manner that strictly complies with the California statutes governing the method of service).

In conclusion, California courts find the notice of intent-to-sue requirement to be satisfied in situations where the health care provider has actual notice of the plaintiff's potential action prior to the expiration of the statute of limitations. The procedural notice requirements mentioned in §364(c) only comes up in those situations where the health care provider claims lack of actual

notice within the statutory period. In these cases, the plaintiff may still satisfy the notice of intent-to-sue (NOI) requirements by providing evidence that she has complied with the service requirements of Chapter 5 of Title 14 of Part 2. For a line of §364 cases which discuss the importance of procedural notice in the absence of actual notice, see the following: *Silver v McNamee*, 81 Cal Rptr 2d 445, 454-56 (Ct App 1999); *Derderian v Dietrick*, 65 Cal Rptr 2d 800 (Ct App 1997); *Hanooka v Pivko*, 28 Cal Rptr 2d 70 (Ct App 1994); and *Godwin v City of Bellflower*, 7 Cal Rptr 2d 524 (Ct App 1992).

In *Jones v Catholic Healthcare West*, 54 Cal Rptr 3d 148 (Ct App 2007), the plaintiff underwent total hip replacement surgery at Defendants' hospital on May 20, 2002. On May 21, 2002, while hospitalized following the surgery, plaintiff fell and suffered injuries to her jaw and teeth. Plaintiff sued, arguing that her fall was a result of the nursing staff's negligence. After a series of agreements between the parties to toll the statute of limitations, plaintiff's attorney faxed defendants a letter on February 2, 2002 which read in part: "This letter shall serve as notice, in accordance with Section 364 of the Code of Civil Procedure, that Joy Jones will file suit against you for damages resulting from her personal injuries of May 21, 2002." Plaintiff then filed her complaint on April 28, 2004. Defendants moved for summary judgment claiming no actual notice and further arguing that the February 2, 2004 fax failed to meet the procedural notice requirements of §364 and therefore could not qualify as a valid notice of intent to sue. Therefore, because the fax was an invalid method of serving notice, the fax could not have tolled the statute of limitations.

The California court rejected defendants' argument, noting (1) that the use of "may" in §364 indicates that, even where no actual notice was provided, the precise method of service outlined

is permissive and not mandatory; and (2) that the notice requirement of §364 is met when the plaintiff has taken adequate steps to provide actual notice to the defendant health care provider. The court concluded that a plaintiff may satisfy the notice requirements of §364 by showing that the defendant health care provider had received actual notice prior to the expiration of the statute of limitations.

"[T]he courts recognize that the purpose of effectuating prelitigation settlement can be achieved only if the health care provider receives actual notice under section 364. Thus, the test is whether plaintiff took adequate steps to achieve actual notice. *Derderian v Dietrick, supra* [plaintiffs failed to take adequate steps to achieve actual notice where they mailed the section 364 notice to the wrong address]; *Hanooka, supra*, [plaintiffs failed to take adequate steps to achieve actual notice where they mailed the section 364 notice to the hospital where defendants had staff privileges], citing *Godwin v City of Bellflower, supra* [plaintiffs failed to take adequate steps to achieve actual notice where they mailed the section 364 notice to the hospital without naming the defendants whose names were known].) **The key is that the health care provider receives notice and the opportunity to enter into settlement negotiations before a complaint is filed. Where the plaintiff does not utilize section 1013 to serve notice of intent to sue under section 364, the plaintiff must show the health care provider received actual notice.**" *Jones*, at 153; emphasis added.

". . . Attorney West could reasonably rely on his past experience that Wiley received documents transmitted to him by fax. Once West determined that Wiley would actually receive the notice of intent to sue if transmitted by fax, there was no need for West to comply with the section 1013, subdivision (e) requirement of an advance written agreement in order to trigger the presumption of service under section 1013. We therefore conclude as a matter of law that the February 2, 2004, notice of intent to sue extended the limitations period and Jones's complaint was timely when filed on April 28, 2004." *Jones*, at 154.

2. FLORIDA.

Fla. Stat. § 766.106(2)(a) (2009)¹

(2) (a) PRESUIT NOTICE. – After completion of presuit investigation pursuant to s. 766.203(2) and prior to filing a complaint for medical negligence, a claimant

¹ This topic was formerly covered by Fla. Stat. §768.57(2).

shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical negligence. Notice to each prospective defendant must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, and copies of all of the medical records relied upon by the expert in signing the affidavit. The requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions for failure to provide presuit discovery.

Similar to their counterparts in California, Florida courts address issues related to adequate notice by focusing on the purpose of the pre-suit notice legislation (i.e., intent-to-sue statutes). The Florida Supreme Court has stated that the goal of the pre-suit notice legislation in the medical malpractice field is “to promote the settlement of meritorious claims early in the controversy in order to avoid full adversarial proceedings.” *Patry v Capps*, 633 So 2d 9, 12 (Fla SCt 1994). In accordance with this purpose, Florida courts have taken a case-protective approach towards the procedural requirements listed in the pre-suit notice legislation, finding that “strict compliance with the mode of service provided in the statute is in no way essential to this legislative goal.” *Id.* Accordingly, Florida courts have consistently held that actual notice is sufficient notice under the pre-suit notice legislation, provided only that the plaintiff’s failure to follow the procedural notice requirements of the statute does not result in prejudice to the defendant.

In *Patry v Capps*, 633 So 2d 9 (Fla SCt 1994), the plaintiffs brought a medical malpractice action against defendant alleging that his negligence during their son's delivery caused their son's cerebral palsy and quadriplegia. Fla. Stat. §768.57(2) requires that a notice of intent-to-initiate-litigation letter (NOI) be sent to the defendant health care provider by certified

mail, return receipt requested.² The undisputed facts were that plaintiffs hand-delivered the letter to defendant and did not send it by certified mail, return receipt requested. The trial court had dismissed the action because plaintiffs failed to strictly comply with the mode of service required by Fla. Stat. § 768.57(2) (1987).

The case was appealed to the Florida Supreme Court, where the issue presented was whether the requirement in a medical malpractice action that notice be given by certified mail, return receipt requested, is (1) a substantive element of the statutory tort, or (2) a procedural requirement that can be disregarded by the trial court when the defendant receives actual written notice in a timely manner that results in no prejudice.

The Supreme Court in *Patry* held that actual written notice of intent (NOI) to initiate litigation for medical malpractice, which results in no prejudice to the defendant, is sufficient notice under §768.57(2) (1987) (current Fla. Stat. § 766.106(2)). The court reached its conclusion because (1) actual notice suitably served the goal of the pre-suit notice legislation; (2) strict compliance with the statutorily-listed method of service (certified mail, return receipt requested) was not essential to serve the goal of the pre-suit notice legislation; and (3) strict enforcement/interpretation of the statutorily-listed notice requirements would lead to an unreasonable conclusion in this case and would be contrary to the legislature's intent.

Key to the Florida Supreme Court's decision was its policy towards procedural requirements:

"[W]hen possible the presuit notice and screening statute should be construed in a manner that favors access to courts. In this case, it is possible to construe the

² This is the same mode of service required under the current version of the statute, §766.106.

provision in a manner that favors access without running afoul of the goal of the legislatively authorized mode of service. This is true because tolling the statute of limitations where receipt of written notice and lack of prejudice are conceded avoids the unreasonable result of denying a valid claim where there is no question that the defendant actually received timely notice, the contents of which is evidenced in writing. Moreover, where the defendant concedes actual receipt there should be no problem computing the other time periods that begin to run after the notice is received." *Patry*, at 13 (internal citations omitted).

In addition (and as this Supplemental Brief does for this Court's consideration of similar Michigan law), the *Patry* court detailed an extensive collection of Florida case law from outside of the medical malpractice field which held that actual notice served as an adequate substitute for the procedurally-specified method of notice. *Id.*

"When considering other statutes that appear to mandate a specific mode of service, several Florida courts have held actual notice by a mode other than that prescribed sufficient. See, e.g., *L & F Partners, LTD. v Miceli*, 561 So. 2d 1227 (Fla 2d DCA 1990) (statute that provides for delivery of notice by certified or registered mail, return receipt requested, in worthless check action required only some type of personal delivery beyond regular mail); *Bowen v Merlo*, 353 So 2d 668 (Fla 1st DCA 1978) (actual delivery of notice by regular mail was sufficient under notice requirement of Mechanics' Lien Law that provided for delivery of notice of claim by certified or registered mail). Most notably, in *Phoenix Ins Co v McCormick*, 542 So 2d 1030 (Fla 2d DCA 1989), the Second District Court of Appeal held actual notice by a mode other than that authorized in section 627.426(2)(a), Florida Statutes (1985), sufficient to preserve an insurer's right to assert a coverage defense. Under that statute a liability insurer is precluded from asserting a coverage defense, unless within thirty days of knowledge of the defense written notice is given to the insured by registered or certified mail, or by hand delivery. The *Phoenix* court recognized that the language providing for notice by certified mail, registered mail, or hand delivery eliminates problems in proving timely service; but held that when the insured concedes actual notice, strict compliance is not required. Recognizing that the statute allows an insurer to deny coverage by certified letter sent to the insured's last known address, even if the insured never actually receives the notice, the *Phoenix* court refused to interpret the statute to permit a denial of coverage where notice is never received but to preclude denial when actual notice by regular mail is conceded. 542 So 2d at 1032."

II. ALL OF THE STATED PURPOSES OF AN NOI – PROMOTION OF EARLY CASE RESOLUTION BY PRE-SUIT SETTLEMENTS AND FULL AND FAIR NOTICE AT AN EARLY STAGE OF THE NATURE OF THE CASE BEING PLANNED - ARE FULLY SERVED BY RECOGNIZING ACTUAL NOTICE TO A RESPONDENT AS SUFFICIENT.

This and other courts have observed on many an occasion that the purpose of Michigan's NOI requirement is to promote settlement without the need for formal litigation and to reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs. *Gulley-Reaves v Baciewicz*, 260 Mich App 478; 679 NW2d 98 (2004); *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997); Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993.

Just as the Florida Supreme Court reasoned in its *Patry, supra* case, this Court should recognize, as did dissenting Judge Jansen in this case at the Court of Appeals, that all purposes of the NOI statute (MCL 600.2912b(2)) are fully served by recognizing that actual notice to a putative Defendant complies with that statute.

As a matter of statutory construction, it must be remembered that the Legislature said, in part, that "Proof of the mailing constitutes *prima facie* evidence of compliance with this section."

³ If there were no other possible means of compliance with this Section ever intended by the

³ In its entirety, MCL 600.2912b provides as follows:
"The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes *prima facie* evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered."

Legislature, then the quoted language would be unnecessary surplusage, which should always be avoided in any statutory construction.⁴ Moreover, due consideration should be given to MCL 600.2301, which directs that “[t]he court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.” As Judge Jansen said of this case in her dissenting Opinion at the Court of Appeals: “In light of the fact that defendants actually received plaintiff’s initial notice of intent, I must conclude that plaintiff’s act of mailing the notice to defendants’ previous address ‘d[id] not affect the substantial rights of the parties.’ MCL 600.2301. Because they actually received the forwarded notice of intent, defendants were not prejudiced by the fact that plaintiff happened to send the notice to their previous address. I would reverse and remand for reinstatement of plaintiff’s complaint.” *Id.*; emphasis added.

⁴ When construing any statute, the Court “must look to the object of the statute, the harm it was designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute”, *Baks v Moroun*, 227 Mich App at 481. **Moreover, the construction and interpretation of the statute must “be aimed at preventing injustice and hardship”, 21 MLP, Statutes § 83 at 86.** To further aid statutory construction and interpretation, Michigan courts have developed a number of rules (i.e., analytical tools) to assist in the process. Those rules include the following: (i) the language of the statute should be construed reasonably, keeping in mind its purpose, *Baks v Moroun*, 227 Mich App at 481. (ii) the Court should “presume that every word has some meaning and should avoid any construction that would render a statute, or any part of it, surplusage or nugatory”, *In re Brzezinski*, 214 Mich App at 663. See also, *MBPIA v Ware*, 230 Mich App at 49. In applying those rules, Michigan Courts have consistently recognized that legislative history is an important component of the analytical process. *In re Brzezinski*, 214 Mich App at 665. According to the *Brzezinski* Court (214 Mich App at 665):

“Courts may examine the Legislative history of an act to ascertain the reason for the act and the meaning of its provisions. . . . A change in statutory phrase is presumed to reflect a change in meaning.” (Emphasis supplied.)

III. DR. GOSSAGE'S PROFESSIONAL CORPORATION IS NOT ENTITLED TO SUMMARY DISPOSITION ON THE BASIS OF ANY CLAIMED DEFECT IN PLAINTIFF'S NOTICE OF INTENT

Dr. Gossage's professional corporation has also requested summary disposition on the basis of a claimed defect in Plaintiff's NOI. The professional corporation is not entitled to such relief.

A malpractice action exists in Michigan against a person or entity who is or holds himself/herself to be "a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency." MCL 600.5838a(1). The significance of this exact terminology being part of MCL 600.5838a was the subject of this Court's decision last year in *Kuznar v Raksha Corporation*, 481 Mich 169; 750 NW2d 121 (2008). In *Kuznar*, the plaintiff was injured when a pharmacy technician, who was not a licensed pharmacist, negligently refilled one of her prescriptions. Plaintiffs filed suit against both the pharmacy technician and the pharmacy where that technician worked.

The defendants in *Kuznar* moved for the dismissal of plaintiffs' case based on the statute of limitations, arguing that plaintiffs' cause of action sounded in medical malpractice and, as a result, the two year limitations period of MCL 600.5805(6) applied. Plaintiffs, on the other hand, argued that the three year statute of limitations which applies to claims of ordinary negligence governed. MCL 600.5805(10).

This Court unanimously held in *Kuznar* that neither the pharmacy technician nor the pharmacy sued by the plaintiffs in that case met the statutory definition of a malpractice case. The Court first held that the term "licensed health facility or agency" as used in MCL 600.5838a, "are those licensed under article 17 of the Public Health Code," MCL 333.20101, *et seq.* *Kuznar*, 481

Mich at 177-178. Based on this definition contained in the Public Health Code, the *Kuznar* Court that a pharmacy is not a licensed health facility or agency. 481 Mich at 178-181.

It is clear that, under the definition of “licensed health care facility” embraced by the Court in *Kuznar*, Dr. Gossage’s professional corporation cannot meet this portion of the definition of a medical malpractice claim provided in MCL 600.5838a(1). Like the pharmacy involved in *Kuznar*, Dr. Gossage’s professional corporation does not meet any of the definitions contained in MCL 333.20106(1), the section of the Public Health Code which the *Kuznar* Court found dispositive on this issue.

The pharmacy defendant in *Kuznar* also argued that it met MCL 600.5838a(1)’s definition of a medical malpractice action because it was a “licensed health professional” for purposes of that statute. This Supreme Court rejected this argument on the following basis:

“A licensed health-care professional is an individual licensed or registered under article 15 of the Public Health Code . . . and engaged in the practice of his or her health professional in a . . . business entity. The flaw in defendants’ proposition is that the Public Health Code defines “individual” to mean “a natural person.” Article 15 defines a “pharmacist” as “an individual licensed under this article to engage in the practice of pharmacy.” However, it does not define a pharmacy as an individual or a natural person.” *Kuznar*, 481 Mich at 179.

Thus, the *Kuznar* Court relied first on language taken directly from §5838a(1)(b), which incorporates into the medical malpractice realm the definition of “licensed health care professional” contained in article 15 of the Public Health Code, MCL 333.16101, et seq. MCL 600.5838a(1)(b) defines a “licensed health care professional” as an individual specified in article 15 of the Public Health Code.

This Court in *Kuznar* further pointed out that the Public Health Code defines “individual” to mean a “natural person.” MCL 333.1105(1). Because the pharmacy involved in *Kuznar* was

not an “individual,” the Court concluded that the defendant pharmacy could not meet the definition of “licensed health care professional” contained in §5838(a)(1). This portion of the *Kuznar* Court’s analysis is equally applicable here. Dr. Gossage’s professional corporation is not itself a “licensed health professional” because this professional corporation is not an individual licensed under article 15 of the Public Health Code.

The fact that Dr. Gossage’s professional corporation is neither a licensed health care professional nor licensed health facility or agency as defined in §5838a has important repercussions for purposes of the issue which defendants in this case raised in their summary disposition motion. The entire thrust of defendants’ argument is that plaintiff failed to comply with the notice of intent statute, §2912b. But that statute specifically provides that a person shall not commence an action alleging medical malpractice against “a health professional or health facility,” unless a pre-suit notice is mailed to the “health professional or health facility” and a mandatory waiting period is observed. But, under section 5838a and this Court’s ruling in *Kuznar*, Plaintiff’s claims against Dr. Gossage’s professional corporation are not subject to the notice of intent requirement since that professional corporation is neither a health professional nor a health facility.⁵

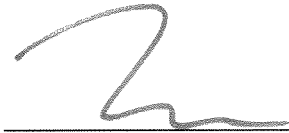
⁵ Plaintiff notes that in April of 2009 the Court directed the parties in *Potter v Murry*, __ Mich __; 762 NW2d 923 (2008) to “submit supplemental briefs addressing the issue whether, if a defendant professional corporation is not an entity to whom notice is required to be provided under MCL 600.2912b, the applicable statute of limitations, MCL 600.5805(6), was nonetheless subject to statutory tolling provided in former MCL 600.5856(d).” In addition, the Court’s previous order granting leave to appeal in *Potter* was limited to the question of whether “defendant Huron Valley Radiology, P.C. is a ‘health facility or agency’ to which a plaintiff is required to provide notice under MCL 600.2912b.” *Id.* Plaintiff’s counsel understands that the Court heard oral argument in March of 2009. Thus, the Supreme Court in the *Potter* case will be undertaking or has

On this basis alone, Dr. Gossage's professional corporation is not entitled to summary disposition.

CONCLUSION & RELIEF REQUESTED

Plaintiff-Appellant respectfully asks the Court to (1) reverse the trial court's ordering granting summary disposition, and (2) remand this case back to the trial court for further proceedings.

Dated: June 5, 2009



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undertaken consideration of this issue regarding whether a notice of intent must be mailed to a professional corporation.